

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition for Rulemaking of the
Telecommunications Resellers Association to
Eliminate Comity-Based Enforcement of
Other Nations' Prohibitions Against the
Uncompleted Call Signaling Configuration of
International Call-Back Service

RM - 9249

COMMENTS OF CABLE & WIRELESS, PLC

Cable & Wireless, plc ("C&W"), by its attorneys and pursuant to Section 1.405(a) of the Commission's Rules, 47 C.F.R. § 1.405(a), hereby submits comments in opposition to the Petition for Rulemaking of the Telecommunications Resellers Association ("TRA"), filed on March 19, 1998. In that petition, TRA asked the Commission to reconsider and change its well-established policies on international call-back services. C&W, through its operating subsidiaries, provides domestic and international telecommunications services in numerous countries. Therefore, its interests could be directly affected by the outcome of this proceeding.

The TRA Petition raises the question whether the U.S. should continue to adhere to well-established principles of international comity by respecting the laws adopted by foreign countries regarding call-back services. C&W submits that the petition should be dismissed because it lacks any empirical or logical foundation. The alleged basis for changing the FCC's policies – the adoption and implementation of the World Trade Organization Agreement on Basic Telecommunications ("WTO Agreement") – is mere pretext. There is no discernible nexus between the WTO Agreement and the Commission's comity-based policy of respecting laws in foreign countries on call-back services.

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The TRA Petition also is objectionable on policy grounds. In effect, TRA is asking the Commission to change its call-back policies in order to promote conduct by certificated U.S. carriers that is illegal in a foreign country. No responsible national regulator could adopt such a policy. Therefore, C&W submits that the Commission should retain its current policy promoting the rule of law as a matter of international comity.

TRA's petition is particularly spurious because TRA cannot identify any concrete problems that have arisen under the Commission's current comity-based call-back policies. In effect, the TRA petition is an untimely petition for reconsideration of the Commission's comity-based call-back policies. Accordingly, the Commission should not initiate the rulemaking proceeding requested by TRA.

Finally, the TRA petition falsely implies that the Commission can both refuse to recognize foreign laws banning call-back service and avoid the question of whether its policies condone violation of such laws by certificated U.S. international carriers. However, the Commission would be forced to address that question if a complaint were filed under the statutory complaint process contending that a U.S. authorized carrier is providing call-back services illegally in a foreign country, because the Commission would then have to decide whether such conduct violates U.S. law and policies. Accordingly, the Commission should not alter its decision that U.S. international carriers, as a condition of their Section 214 authorizations, should not provide call-back services in violation of foreign laws or policies.

ARGUMENT

I. TRA HAS NOT JUSTIFIED MODIFYING THE COMMISSION'S CALL-BACK POLICIES.

The Commission formulated its call-back policies in VIA USA, Ltd, 9 FCC Rcd 2288 (1994) (the “Call-Back Order”), aff’d on recon., 10 FCC Rcd 9540 (1995) (the “Call-Back Reconsideration Order”). In those decisions, the Commission found that the U.S. public interest was best served by international resale and granted the applications of three carriers requesting authority to provide international call-back services. The Commission rejected arguments that the applicants’ call-back services violated U.S. laws or international law.

At the same time, the Commission emphasized that where foreign countries prohibit call-back services, overriding considerations of international comity dictate that the FCC should “assist in the effective enforcement of such foreign laws and regulations.”¹ Therefore, the Commission affirmatively required U.S. carriers, as a condition of their Section 214 authorizations, to “provide service in a manner that is consistent with the laws of countries in which they operate.”² The Commission underscored that “[a]ny demonstrated failure to observe this requirement will be subject to FCC enforcement action.”³ The Commission reasoned that “[w]e would expect no less from foreign governments in a comparable context.”⁴

In adopting the policy that U.S. international carriers should not provide call-back services in violation of foreign laws, the Commission did not bind itself to investigate alleged violations of foreign laws on call-back services or otherwise to actively police U.S. carriers’

¹ Call-Back Reconsideration Order, ¶50.

² Call-Back Order, ¶18

³ Call-Back Reconsideration Order, ¶51.

⁴ Id., ¶50.

compliance with such laws. Rather, the Commission agreed, “as a matter of international comity, to take note of foreign governments’ legal determinations that international call-back services violate their domestic laws.”⁵ The Commission explained:

“Any foreign government which has expressly found international call-back using uncompleted call signalling to be unlawful, and which has been unable to enforce its domestic law or regulation against U.S. providers of this offering, may so notify the United States Government. Its notification should include specific documentation of its legal restrictions on international call-back utilizing uncompleted call signalling, evidence of violations by particular carriers, and a description of its enforcement measures. Any foreign government also may confer to the Commission’s staff documentation of its specific statutory or regulatory measure in order to put U.S. carriers on notice that international call-back utilizing uncompleted call signalling is illegal in its territory. To facilitate such notification, we will maintain and periodically publish a list of countries which have forwarded such information to the Commission. The Commission’s staff will maintain a file of all such communications, for appropriate agency action and reference.”⁶

TRA now petitions the Commission to initiate a rulemaking proceeding to abjure its comity-based enforcement policy in light of the market and regulatory changes caused by the WTO Agreement and the FCC’s policies in IB Docket No. 97-142 implementing that treaty. TRA argues that since the U.S. has moved towards a more open entry environment in implementing the WTO Agreement, the U.S. should not continue to help foreign countries enforce their laws regarding one particular service – namely, international call-back services. TRA’s invocation of the WTO Agreement as a basis for changing the Commission’s call-back policies is patently insubstantial and, therefore, its petition should be dismissed.

⁵ Id., ¶53 (emphasis supplied).

⁶ Id., ¶52.

A. The WTO Agreement Has Nothing To Do With TRA's Requested Rulemaking.

There is simply no logical nexus between the WTO Agreement and TRA's requested rulemaking. Initially, TRA does not contend that foreign laws prohibiting call-back services violate the WTO Agreement.⁷ While TRA is undoubtedly correct that the WTO Agreement will accelerate the trend toward liberalization and competition in the U.S. and other WTO member countries, that trend does not justify repealing the Commission's comity-based policies regarding the enforcement of foreign countries' laws and policies. International policies designed to foster global competition, as reflected in the WTO Agreement, and policies based on international comity are distinct, and their respective developments are not interrelated as TRA suggests. Further, TRA has asked the FCC to change its comity-based enforcement policies for all foreign countries, even those who are not WTO members or who did not sign the WTO Agreement.⁸

B. The Commission Should Not Abandon The Doctrine Of International Comity.

As a policy matter, the Commission should decline TRA's invitation to launch a head-on attack on the doctrine of international comity. In effect, the TRA Petition asks the Commission to rule that it would never, under any circumstances, take action against a U.S.

⁷ In any event, such an argument would not support changing the Commission's call-back policies. The FCC has recognized that the sole remedy for violations of the WTO Agreement lies with the WTO dispute resolution procedures. See, e.g., Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, 12 FCC Rcd 23891, ¶28 (1997).

⁸ TRA argues that the Commission should not help WTO countries enforce laws against call-back services given that the U.S. market is now "fully open to carriers based in such countries." TRA Petition at 15. However, TRA would repeal the Commission's comity-based enforcement policies even for countries whose carriers have not entered, and do not wish to enter, the U.S. market.

carrier that is providing call-back services in violation of foreign laws or regulations. That extreme proposal completely ignores the indispensable role played by international comity and cooperation among countries in developing the global telecommunications industry.

The Commission has consistently recognized what TRA apparently forgets – namely, that international comity is a two-way street. The Commission expressly based its comity-based policies upon the clear U.S. public interest in having U.S. laws and policies respected and enforced by foreign governments and regulators. As the Commission noted pointedly, “[w]e would expect no less from foreign governments in a comparable context.”⁹ Even when a foreign country might disagree with a U.S. law or policy, the Commission is justified in expecting the foreign country, as a matter of international comity, to honor the rule of law by providing whatever enforcement assistance might be necessary. The U.S. cannot expect to benefit from international comity unless, as the Commission has already recognized, the U.S. itself is willing to respect the rule of law in other countries under the doctrine of international comity. It is ironic that TRA bases its rulemaking request upon the WTO Agreement because that agreement almost surely would not have come to fruition if the signatories did not trust each other to observe the rule of law through international comity.

TRA’s approach would also require the U.S. to violate its obligations under the resolution on alternative calling services adopted at the 1994 ITU Plenipotentiary Conference in Kyoto, Japan (“Kyoto Resolution”). Under the Kyoto Resolution, the United States agreed that when it has jurisdiction over a call-back provider whose operations infringe another member state’s laws, it would “inquire into the matter and take such actions as may be appropriate within

⁹ Call-Back Reconsideration Order, ¶50.

the constraints of its national law.”¹⁰ TRA’s approach, which rejects all concerns based on international comity, is plainly inconsistent with the letter and spirit of U.S. obligations under the Kyoto Resolution as found by the FCC in the Call-Back Reconsideration Order.¹¹

C. TRA’s Petition Should Be Dismissed As Spurious, Because TRA Has Not Shown, Or Even Alleged, That The Current Policy Is Not Working Well.

Lastly, the TRA Petition fails for a quite practical reason. Nowhere does TRA claim that there have been any concrete problems with the Commission’s current comity-based policy. TRA has failed to meet its burden to show any reason for the Commission to initiate a new rulemaking to modify its comity-based call-back policies. Its petition is nothing more than an untimely petition for reconsideration of those policies and it should be dismissed as such. Absent any reason to believe that the current policy is not working well, TRA’s petition should be dismissed as spurious.

II. THE COMMISSION SHOULD NOT ALTER ITS DECISION THAT U.S. INTERNATIONAL CARRIERS, AS A CONDITION OF THEIR SECTION 214 AUTHORIZATIONS, SHOULD NOT PROVIDE CALL-BACK SERVICES IN VIOLATION OF FOREIGN LAWS OR POLICIES

In its petition, TRA asks the FCC to “rescind all remaining comity-based prohibitions against . . . the laws of other nations prohibiting[] the provision of international call-back service utilizing uncompleted call signalling.”¹² Construed broadly, that relief would extend to repealing the Commission’s prior determination that U.S. international carriers, as a condition of their Section 214 authorizations, may not provide call-back services in violation of

¹⁰ Final Acts of the Plenipotentiary Conference (PP-94), Res. COM4/6 (Kyoto, 1994).

¹¹ Call-Back Reconsideration Order, ¶48.

¹² TRA Petition at 1-2.

foreign laws and policies.¹³

TRA's request should be dismissed because it is implicitly based on a false premise: namely, that the Commission can both refuse to recognize foreign laws banning call-back service and avoid the question of whether its policies condone violation of such laws by authorized U.S. international carriers.¹⁴ The Commission will be forced to examine whether its policies condone violation of foreign laws banning call-back service each time a complaint is filed under the statutory complaint process, because it must then decide whether the conduct challenged in that complaint violates the Communications Act or the Commission's policies.¹⁵

For example, if a foreign government or carrier were to file a complaint contending that a U.S. authorized carrier is engaging in an unreasonable practice in violation of U.S. law by providing call-back services illegally in a foreign country, the Commission would have to decide whether such conduct violates U.S. laws and policies. In this case, the only responsible position that the Commission (or any other national regulator in a similar situation) could take is to affirm that the carriers it licenses are required to comply with the applicable laws and policies of foreign countries. To its credit, the Commission already has taken that position in response to complaints filed by a foreign carrier against U.S. carriers who were providing call-back services illegally in a foreign country.¹⁶ C&W respectfully suggests that the Commission

¹³ Id. at 2 & n.2

¹⁴ Even TRA is not so bold as to contend that the FCC should promulgate policies that expressly promote illegal conduct by U.S. carriers in foreign countries.

¹⁵ 47 U.S.C. §206; MCI Telecommunications Corp. v. FCC, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (emphasizing "mandatory" nature of Commission's adjudicatory authority under Section 206).

¹⁶ See Philippine Long Distance Telephone Co. v. USA Link, L.P. d/b/a USA Global Link, 12 FCC Rcd 12010 (1997) (granting complaint filed by foreign carrier against U.S. call-back providers for violating Philippines law against call-back services).

should refuse to reexamine its position by denying TRA's petition.

CONCLUSION

As explained above, C&W respectfully submits that the Commission should reject the TRA Petition because TRA has failed to demonstrate any logical or empirical nexus between the WTO Agreement and the Commission's comity-based call-back policies. Further, dismissal of the petition is warranted due to the strong U.S. public interest in support of the doctrine of international comity, as well as TRA's pointed failure to identify any concrete problems with the current policies. Finally, TRA has not provided any justification for altering the Commission's decision that U.S. international carriers, as a condition of their section 214 authorizations, should not provide call-back services in violation of foreign laws or policies

Respectfully submitted,

CABLE & WIRELESS, PLC

By:

A handwritten signature in black ink, appearing to read "Philip V. Permut", written over a horizontal line.

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May 1, 1998

CERTIFICATE OF SERVICE

I, Linda Crump, hereby certify that I have served a copy of the foregoing "Comments of Cable & Wireless, plc" on this 1st day of May, 1998, upon the following parties by hand delivery:

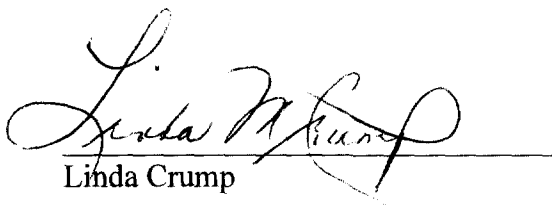
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